PUI JIN TECK

v.

TIMBALAN MENTERI DALAM NEGERI MALAYSIA & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[CRIMINAL APPLICATION NO: 44-2-2010-II]
6 AUGUST 2010

CRIMINAL PROCEDURE: *Habeas corpus - Preventive detention - Detention order under s. 6(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 - Whether failure to explain detention order, grounds of detention and right to make representation - Whether detainee understood documents signed by him - Whether detainee can cross-examine deponent of affidavit - Whether failure to state grounds of detention and name of arresting officer in affidavit amounted to procedural non-compliance - Whether detention bad due to discontinuance of previous detention proceedings - Whether court can examine truthfulness or sufficiency of allegations - Whether detention order must mention quantity of drugs involved*

The applicant, a 28-year-old living in Kuching, was first arrested on 18 July 2009 and detained under s. 6(1)(a) of the Dangerous Drugs (Treatment & Rehabilitation) Act 1983 ('DDTRA83'). On 2 September 2009, he was rearrested and detained under s. 3 of the Dangerous Drugs Act (Special Preventive Measures) Act 1985 ('DDASPMA85') before being sent to the Simpang Renggam Detention Centre pursuant to the order of the Deputy Home Minister dated 30 October 2009 under s. 6(1). The earlier proceeding under the DDTRA83 was discontinued. The applicant claimed that he could not understand Malay very well. When he was asked to sign the documents, he wrote "cannot understand" in Chinese characters. The applicant filed the present *habeas corpus* application on the grounds that there was a failure to explain the detention order, the grounds of detention of the Minister and the right to make representation to the Advisory Board. Counsel for the applicant also contended: (i) that the applicant must be allowed to cross-examine Inspector Nazarudin and KPL Tang Poh Loong who had affirmed that the applicant understood the grounds of detention and the right to make legal representation; (ii) that Inspector Nazarudin's affidavit failed to reproduce the grounds of detention in the body of the affidavit; (iii) that the grounds of detention alleged that the applicant was involved in drug activities since February of 2006 but the detention order was only made in October of 2009; (iv) that the prosecution had discontinued proceedings under the DDTRA83 and proceeded under DDASPMA85; (v) that the name of the arresting officer or the inquiry officer and the grounds of arrest were not mentioned in the affidavit of the police

officers; (vi) that the allegations of facts relating to the detention grounds were false; (vii) that after the date of the order of the Deputy Minister, the applicant was not sent to the Simpang Renggam Detention Centre immediately but kept in the Lock-up of Siburan Police Station and that this detention in the Lock-up could not constitute "journey"; and (viii) that the detention order did not mention of the quantity of drugs that the applicant distributed.

Held (dismissing the application):

(1) *Habeas corpus* applications are normally heard purely on affidavit evidence as provided in s. 366 of the Criminal Procedure Code. The court can determine the issues that arise from conflicting affidavits on inherent probabilities and other surrounding evidence. There was a real risk that the cross-examination on the affidavit may turn the *habeas corpus* application into a full blown trial which is not envisaged by the law. (para 4)

(2) It was difficult to believe that the applicant, a young man of 28 years of age, could not understand even simple Malay. He was a Malaysian citizen. There was no reason to believe him that he did not understand the explanation by Inspector Nazarudin. In any event, KPL Tang Poh Loong's affidavit evidence that the applicant understood him in Mandarin should be given credence. (para 4)

(3) The grounds of detention and allegations of fact on which it was based were exhibited in Inspector Nazarudin's affidavit and he referred to this exhibit. This was good as the grounds of detention being stated in the body of the affidavit. In any event, s. 6 of DDASPMA85 does not require the grounds of detention to be stated in the affidavit of a police officer. Therefore, the failure to reproduce the grounds of detention in the affidavit would not amount to procedural non-compliance; *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3)* (dist). (para 5)

(4) The argument that the grounds of detention against the applicant were stale at point of time when Deputy Minister made the detention order was rejected in the Federal Court case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors*. (para 6)

(5) There is nothing in the DDASPMA85 that prevents the Minister from making the detention order on the ground that a previous criminal or preventive detention proceeding had been discontinued. (para 8)

(6) Failure to mention in the affidavit the names of the arresting officer or inquiry officer or the grounds of arrest does not come within the ambit of procedural non-compliance. In any event, such irregularity would have been superseded by the detention order signed by the Deputy Minister. There is also no requirement under the DDASPMA85 to furnish the name of the arresting officer or the inquiry officer to the applicant. (para 9)

(7) Truthfulness or sufficiency of allegations relied on by a detaining authority cannot be examined by the courts as long as the detaining authority complied with the relevant procedural requirements; *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia;* (refd), *Noor Ashid Sakib v. Ketua Polis Negara* (refd) and *Athappen Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* (refd). (para 12)

(8) Simpang Renggam Detention Centre is in West Malaysia. Therefore, a few days of detention in a police lock-up in Kuching can be construed as coming within the words "during the duration of the detention order on journey". In any event, s. 6A(1)(a)(ii) and (iii) of the DDASPMA85 are disjunctive. The former provision is widely worded. It allows the applicant to be continued to be detained in the same place as before the making of the detention order by the Minister. (para 14)

(9) Preventive detention cannot be equated to a criminal trial. Under s. 6, the Minister can make a detention order against any person associated with any activity relating to or involving the trafficking in dangerous drugs. The Minister is not required to be satisfied that the applicant was actually trafficking. It is sufficient if the applicant was associated with any activity relating to or involving the trafficking. (paras 15 & 16)

Case(s) referred to:

Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No. 3) [2001] 2 CLJ 709 HC ***(dist)***

Athappen Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1983] 1 LNS 49 HC ***(refd)***

Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia [1969] 1 LNS 65 FC ***(refd)***

L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 7 CLJ 653 FC ***(refd)***

Lee Kew Sang v. Timbalan Menteri Dalam Negeri Malaysia & Ors [2005] 3 CLJ 914 FC ***(refd)***

Lee Sew Kai v. Menteri Dalam Negeri, Malaysia & Ors [1989] 1 LNS 167 HC ***(refd)***

Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2005] 4 CLJ 613 FC ***(refd)***

Nagarathinam v. Timbalan Menteri Keselamatan Dalam Negeri, & Ors, (05-01-2006) (Unreported) ***(refd)***

Noor Ashid Sakib v. Ketua Polis Negara [2001] 4 CLJ 737 HC ***(refd)***
Palautah Sinnappayan & Anor v. Timbalan Menteri Dalam Negeri, Malaysia & Ors [2010] 2 CLJ 133 FC ***(refd)***
Su Yu Min v. Ketua Polis Negeri & Ors [2005] 3 CLJ 875 HC ***(refd)***
Thamilvanen Kandasamy v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors [2007] 8 CLJ 717 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 366
Dangerous Drugs (Special Preventive Measures) Act 1985, ss. 3, 6(1), (a), 6A(1)(a)(i), (ii), (iii)
Dangerous Drugs (Treatment and Rehabilitation) Act 1983, s. 6(1)(a)
Emergency (Public Order and Prevention of Crime) Ordinance 1969, s. 4(1)

For the applicant - Voon Lee Shah; M/s Voon & Co Advocates
For the defendants - Mohd Azlan Shah Mohd Allias; SFC

Reported by Amutha Suppayah

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is a *habeas corpus* application to set free the applicant who is being detained under s. 6(1) of the Dangerous Drugs Act (Special Preventive Measures) Act 1985 at the Simpang Renggam Detention Centre.

Brief Facts

[2] The applicant is a 28 year old who lives in Kuching. He was first arrested on 18 July 2009 and detained under s. 6(1)(a) of the Dangerous Drugs (Treatment and Rehabilitation) Act 1983. He was released on bail pending the hearing of the application for an order under the said section. However, on 2 September he was arrested again at his residence. He was detained under s. 3 of the Dangerous Drugs Act (Special Preventive Measures) Act 1985 before being sent to the Simpang Renggam Detention Centre pursuant to the order of the Deputy Home Minister under s. 6(1). The earlier proceeding under the Dangerous Drugs (Treatment and Rehabilitation) Act 1983 was discontinued. The detention order signed by the Minister was served on the applicant on 31 October 2009. The order is dated 30 October 2009.

Grounds Of Application

[3] Prior to the instant application for *habeas corpus*, the applicant made two other attempts to secure his freedom. The first *habeas corpus* application was directed against the order of detention pending investigation. This application failed because, by the time of the hearing,

the Minister had made a detention order under s. 6(1). The second *habeas corpus* application was struck out with liberty to file afresh as the applicant did not file an affidavit in support. For the purpose of the present *habeas corpus* application, the applicant and his mother have filed affidavits in support. The main grounds of the application are as follows:

That There Was A Failure To Explain The Detention Order, The Grounds Of Detention Of The Minister And The Right To Make Representation To The Advisory Board.

[4] The applicant deposed that he could not understand Malay very well. He was asked to sign documents written in a language that he could not read. Since he did not understand, he wrote "cannot understand" in Chinese characters. The respondents have relied on affidavits of Inspector Nazarudin and KPL Tang Poh Loong to rebut this allegation. Inspector Nazarudin deposed that he explained the detention order, grounds of detention and the right to make legal representation to the applicant. He served the detention order, the grounds of detention which includes the allegations of fact on which the order is based and the notice of right to make representations. He was assisted in this task by KPL Tang Poh Loong who is able to speak in various Chinese dialects as well as Mandarin. KPL Tang Poh Loong deposed an affidavit to the effect that he translated the detention order signed by the Minister as well as the grounds of detention to the applicant who understood him. He also explained that the applicant has a right to make representations against his detention. I must mention here that at the outset of the hearing, counsel for applicant applied to cross-examine Nazaruddin and KPL Tang Poh Loong. Counsel for applicant submitted that they were not telling the truth. He cited the case of *Lee Sew Kai v. Menteri Dalam Negeri, Malaysia & Ors* [1989] 1 LNS 167 in support. The sole issue in that case was whether the application to cross-examine the deponent of an affidavit in a preventive detention case should be allowed. The High Court allowed the application. However, the Editor's note to the law report states that the appeal by the Home Minister was allowed. Therefore this case is no longer good law. *Habeas corpus* applications are normally heard purely on affidavit evidence as provided in s. 366 of the Criminal Procedure Code. The applicant has deposed that the grounds of detention were not explained to him. On the other hand, Inspector Nazarudin and KPL Tan Poh Loong deposed otherwise. Diametrically opposite averments in an affidavit are common but there is no necessity for a cross-examination to determine the truth or falsity of the allegation. The court can determine the issues that arise from conflicting affidavits on inherent probabilities and other surrounding evidence. There is a real risk that the cross-examination on the affidavit may turn this *habeas corpus* application into a full blown trial which is not envisaged by the law. I therefore dismissed the application. Coming back to the above ground,

the applicant deposed that the detention order, the grounds of detention and that his right to representation were not explained to him in a language that he understood. That was the reason he wrote "do not understand" in Chinese at the signature column. However, Inspector Masitah, who recorded a statement from the applicant, deposed in her affidavit that the applicant told her that it was his counsel who advised him through his mother to sign in that fashion. Inspector Nazarudin who was the investigating officer deposed that he explained to the applicant himself and he was assisted by KPL Tang Poh Loong. For this purpose, KPL Tang Poh Loong had a short conversation with the applicant in Mandarin. He was satisfied that the applicant understood Mandarin before he translated the detention order, the grounds of detention and right to make representation. KPL Tang Poh Loong's claim in his affidavit that he was fluent in several Chinese dialects as well as Mandarin was never challenged. I see no reason to disbelieve the averments in Inspector Nazarudin and KPL Tang Poh Loong's affidavit. The detention order had been signed by the Deputy Home Minister and therefore they have nothing to gain by either not explaining the detention order, the grounds of the detention order and right to make representation or by lying that they have done so when they have not. They were performing an official duty in which they had no personal interest (see *Su Yu Min v. Ketua Polis Negeri & Ors* [2005] 3 CLJ 875. The applicant on the other hand has a lot to gain by not telling the truth; in fact nothing less than his freedom by lying that he could not comprehend what was said to him by Inspector Nazarudin or KPL Tang Poh Loong. I also find it very hard to believe that the applicant who is a young man of 28 years of age could not understand even simple Malay. He is Malaysian citizen and there is no suggestion that he did not live in this country his entire life (see *Nagarathinam v. Timbalan Menteri Keselamatan Dalam Negeri & Ors* (05-01-2006) an unreported case of the Federal Court cited by the Federal Counsel). I therefore see no reason to believe him that he did not understand the explanation by Inspector Nazarudin. In any event, KPL Tang Poh Loong's affidavit evidence that the applicant understood him in Mandarin should be given credence.

Failure To State The Grounds Of Detention In The Affidavit Of Inspector Nazarudin

[5] In Inspector Nazarudin's affidavit he stated the grounds of detention were explained to the applicant. However, he did not reproduce the grounds in the body of his affidavit. Counsel for applicant submitted that the failure to do so is fatal and he cited the case of *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3)* [2001] 2 CLJ 709. In that case which concerned a preventive detention

order under the Internal Security Act 1960, the court held that the failure to state the grounds of detention in the affidavit of the arresting officer is fatal. However, in my opinion, the affidavit in the instant case can be distinguished. This is because the grounds of detention and allegations of fact on which it was based were exhibited in his affidavit. Inspector Nazarudin referred to this exhibit. Therefore, it is as good as the grounds of detention being stated in the body of the affidavit. In any event, s. 6 of Dangerous Drugs Act (Special Preventive Measures) Act 1985 does not require the grounds of detention to be stated in the affidavit of a police officer. Therefore the failure to reproduce the grounds of detention in the affidavit would not amount to procedural non-compliance. I therefore see no merit in the point being taken.

Delay In Issuing The Detention Order

[6] In the grounds of detention, it is alleged that the applicant was involved in drug activities since February of 2006 but the detention order was only made in October of 2009. Counsel for applicant also submitted that after the arrest in July of 2009, no steps were taken to issue an order under the Dangerous Drugs Act (Special Preventive Measures) Act 1985. In respect of the first point, the essence of the argument is that the grounds of detention against the applicant were stale at the point of time when the Deputy Minister made the detention order. This argument was rejected in the Federal Court case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914. The case concerned an order pursuant to s. 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969. The said ordinance together with the Internal Security Act and the Dangerous Drugs Act (Special Preventive Measures) Act 1985 were amended in 1989 to limit grounds of judicial review to procedural non-compliance only (see A740, Act A739 and Act A738 of 1989). Judicial review for the purpose of the amendment includes an application for a writ of *habeas corpus*. The Federal Court in the above cited case said that pre-amendment cases and post amendment cases that did not have regard to the said amendment must be treated with caution. The Federal Court proceeded to rule that the "delay" argument is not valid as there is no procedural requirement regarding time. The Federal Court noted that delay in making the detention order was cited in the pre-amendment cases to support the allegation of *mala fide* in the wider sense. However the Federal Court said that the relevant question to ask now is whether:

> Be that as it may, now, after the amendments, is there a "condition precedent" which must be a procedural requirement that the order may only be made within a certain time from the time of the alleged criminal activities? That is the pertinent question now and the answer is "No".

[7] Counsel for applicant also cited the case of *Thamilvanen Kandasamy v. Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors* [2007] 8 CLJ 717 in support of the delay argument. However, the facts of this case can be distinguished. In this case, there was unexplained delay of three days between the date of the order of the Minister and the date of commencement. In the instant case the date of the order is 30 October 2009 and the date of commencement is stated as 31 October 2009. In the premises, there is no merit in the ground of delay canvassed by counsel for applicant.

Mala Fide And Double Jeopardy

[8] Counsel for applicant argued at length on the above grounds because the prosecution discontinued proceedings under the Drug Dependants (Treatment and Rehabilitation) Act 1983 and proceeded under Dangerous Drugs Act (Special Preventive Measures) Act 1985. In my opinion, there is absolutely no merit in this ground. After the 1989 amendment, a challenge to preventive detention order can be mounted on the ground of procedural non-compliance only. There is nothing in the Dangerous Drugs Act (Special Preventive Measures) Act 1985 that prevents the Minister from making the detention order on the ground that a previous criminal or preventive detention proceeding had been discontinued. In *Palautah Sinnappayan & Anor v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 2 CLJ 133, the Federal Court held that the principle of *autrefois acquit* does not apply to preventive detention proceedings under Emergency (Public Order and Prevention of Crime) Ordinance 1969. By analogy this precedent should apply to the instant case as well.

Grounds Relating To The Arrest And Investigation

[9] Counsel for applicant submitted that the name of the arresting officer or the inquiry officer was not mentioned in the affidavit of the police officers. It was also alleged on behalf of the applicant that the arresting officer did not furnish grounds of arrest to justify further action. It was also argued that the Deputy Minister should have heard the applicant before making the detention order. In my opinion all these grounds do not come within the ambit of procedural non-compliance. The irregularity in the failure to inform the applicant the grounds of arrest at the investigation stage, even if accepted as true, would have been superseded by the detention order signed by the Deputy Minister (see *Palautah Sinnappayan & Anor v. Timbalan Menteri Dalam Negeri, Malaysia & Ors, supra*). There is also no requirement under the Dangerous Drugs Act (Special Preventive Measures) Act 1985 to furnish the name of the arresting officer or the inquiry officer to the applicant. There is also no requirement for the Minister to hear the applicant before making the detention order. The Minister is only required to have

regard to the report of the investigating officer and the inquiry officer before making the detention order. That is the only pre-condition. As stated in the Federal Court case of *Mohd Faizal Haris v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 4 CLJ 613:

> It follows that it is only when the wording of a statute requires a proper arrest as a condition precedent to the making of a subsequent detention order can a person make a valid complaint of the detention.
>
> The precondition to the exercise of jurisdiction under s. 6(1) is, *inter alia*, only a consideration of the report of investigation. There is no stipulation in s. 6(1) that it must be the result of a valid detention. The preparation of the report is governed by s. 4 pursuant to which any person may be examined and it is not confined to an examination of only the detained person. The report of investigation therefore has no direct link with the detention; the only one being that it may contain a statement from the detained person. It can still be considered by the Minister even if it contains a statement from a person whose detention under s. 3(1) is irregular.

[10] The above cited case was approved and followed in the recent decision of the Federal Court in *L Rajanderan R Letchumanan v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2010] 7 CLJ 653. Abdul Hamid Embong FCJ noted as follows in that case:

> The manner on conducting the investigations and arrests at this stage, is neither a condition precedent nor a matter which has a direct link with the detention order and thus not a ground for judicial review. Previous cases such as *Koh Yoke Koon v. Minister for Home Affairs, Malaysia & Anor* [1987] 1 LNS 67; [1988] 1 MLJ 45, which held that a detention order made against a suspect who had been illegally detained by the police at the investigation stage is subject to judicial review are no longer good law since this is not a procedural non-compliance of a condition precedent to nullify the detention order. (see also the Federal Court case of *Lee Kew Sang v. Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2005] 3 CLJ 914).

[11] In the premises, the grounds relating to the arrest and investigation are a non-issue in respect of the legality of the detention order of the Deputy Minister.

Truthfulness Of The Grounds Of Detention

[12] Counsel for applicant submitted that the allegations of facts relating to the detention grounds are false. I need not belabour this point of counsel as it is not a justiciable ground. Apart from the 1989 amendment which had effectively removed this ground from the sphere of judicial review, it has long been held that truthfulness or sufficiency of allegations relied by a detaining authority cannot be examined by the courts as long as the detaining authority complied with the relevant procedural

requirements (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 1 LNS 65), *Noor Ashid Sakib v. Ketua Polis Negara* [2001] 4 CLJ 737) and *Athappen Arumugam v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1983] 1 LNS 49.

The Applicant Was Detained In A Lock Up Prior To Being Sent To Simpang Renggam

[13] It was alleged that after the date of the order of the Deputy Minister, the applicant was not sent to the Simpang Renggam Detention Centre immediately but kept in the lock-up of Siburan Police Station between the date of the order, ie, 30 October 2009 and 3 November 2009. Counsel for applicant submitted that the detention in the lock-up cannot constitute a "journey". Section 6A of the Dangerous Drugs Act (Special Preventive Measures) Act 1985 reads as follows:

> **6A. Detention order not to be invalid or inoperative on certain grounds**
>
> (1) No detention order shall be invalid or inoperative by reason:
>
> (a) that the person to whom it relates:
>
> (i) was immediately before the making of the detention order detained in any place other that a place of detention referred to in subsection (2) of section 6;
>
> (ii) continued to be detained immediately after the making of the detention order in the place in which he was detained under section 3 before his removal to a place of detention referred to in subsection (2) of section 6, notwithstanding that the maximum period of such detention under subsection (2) of section 3 had expired; or
>
> (iii) was during the duration of the detention order on journey in police custody or any other custody to a place of detention referred to in subsection (2) of section 6; or

[14] I see no merit in this point. Simpang Renggam Detention Centre is in West Malaysia. Therefore, I do not see why a few days detention in a police lock-up in Kuching cannot be construed as coming within the words "during the duration of the detention order on journey". It is reasonable to assume that the flight arrangements must be made before the applicant can be sent to the detention centre in West Malaysia. In any event, it must be noted that sub-ss. 6A(1)(a)(ii) and (iii) are disjunctive. The former provision is widely worded. It allows the applicant to be continued to be detained in the same place as before the making of the detention order by the Minister.

Other Grounds

[15] Counsel for applicant has also raised other grounds which clearly do not fall within the ambit of procedural non-compliance on the part of the Deputy Minister when he signed the order of detention. For this reason, they lack merit and must be dismissed. Counsel for applicant submitted that in NH1 (the detention order), the Deputy Minister said that the subject was involved in "pengedaran" of dangerous drugs. He said that "pengedaran" in English is "distribution". He also submitted that there is no mention of the quantity of drugs that the applicant distributed. I fail to make out the purpose of these arguments. Preventive detention cannot be equated to a criminal trial. Under s. 6, the Minister can make a detention order against any person associated with any activity relating to or involving the trafficking in dangerous drugs. Therefore, the Minister is not required to be satisfied that the applicant was actually trafficking. It is sufficient if the applicant was associated with any activity relating to or involving the trafficking. Surely it cannot be argued that the distribution of drugs does not relate to the act of trafficking.

[16] In conclusion, having regard to the recent Federal Court judgments that a *habeas corpus* application must come within the ambit of procedural non-compliance or fail, I find no merit in all the points taken by counsel for applicant. I shall therefore dismiss this application.